76-576

No._____

IN THE

Supreme Court of the United States

October Term, 1976

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,
Petitioner,

vs.

EASTERN NAVAJO INDUSTRIES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TONEY ANAYA
Attorney General of the
State of New Mexico

VERNON O. HENNING
Special Assistant Attorney General
Bureau of Revenue
Manuel Lujan Sr. Building
P. O. Box 630
Santa Fe, New Mexico 87503

Counsel for Petitioner

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The Petitioner, Bureau of Revenue of the State of New Mexico, respectfully asks that a writ of certiorari issue to review the opinion and order of the Court of Appeals of the State of New Mexico filed on June 29, 1976.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A annexed, is reported at 552 P.2d 805 (Ct.App. 1976).

JURISDICTION

The Petitioner seeks review of the opinion and judgment of the Court of Appeals of the State of New Mexico filed with the clerk of that court on June 29, 1976. On July 15, 1976, a petition for a writ of certiorari was filed with the Supreme Court of the State of New Mexico. The Supreme Court denied the petition on July 27, 1976. The printed petition and order of denial are annexed as Appendices B and C.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. a) Do 25 U.S.C. Sec. 13 and 25 CFR Secs. 80.1 *et seq.* pre-empt state jurisdiction to tax the receipts of a corporation created under state law where the corporation does business with a tribal organization?

b) Does ownership by Indians of shares of stock in a corporation affect the legal status of the corporation?

2. Does state taxation of the gross receipts of a corporation created under state law doing business with a tribal organization impermissibly burden tribal self-government?

3. Can federal legislation enacted in 1974 concerning funding of Indian enterprises pre-empt a state's taxing jurisdiction where the periods covered by the state tax assessment were prior to 1974?

STATUTES AND REGULATIONS INVOLVED

1. 4 U.S.C. Sec. 109.

   Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. At page 161, 1970 Edition.

2. 25 U.S.C. Sec. 13, at pages 6088-6089, 1970 Edition. Reproduced in Appendix E.

3. 25 CFR Secs. 80.1, 80.2, 80.12, 80.41, and 80.62 at pages 114-116 (1971). Reproduced in Appendix F.

STATEMENT OF THE CASE

This case arose as the result of a protest by Eastern Navajo Industries, Inc. to an assessment of gross receipts tax, penalty, and interest by the Bureau of Revenue on February 1, 1973. The Respondent filed its protest to the assessment with the Commissioner of Revenue on February 5, 1973. A decision and order was issued by the Commissioner of Revenue (printed as Appendix D annexed) following a hearing held on June 18, 1975. The administrative decision (Appendix D, Par. 13) concluded among other things, that no federal law prohibited the taxation of the Respondent by the State of New Mexico.

The Respondent was a business corporation organized under New Mexico's Business Corporation Act, Secs. 51-24-1 *et seq.*, N.M.S.A. 1953. The stock of the corporation was divided between several members of the Navajo Tribe (51%) and two non-members (49%).

The major part of the Respondent's business was building single-family dwellings under two contracts with the Navajo Housing Authority. The gross receipts tax assessed was based on the receipts from constructing these housing projects.

The corporation maintained its physical plant on land owned by the federal government but controlled by the Navajo Tribe at Crown Point, New Mexico near the City of Gallup, New Mexico. The Respondent had been granted a permit by the Tribe to locate at that site.

Following the issuance of the administrative decision against it, the Respondent filed an appeal with the Court of Appeals of the State of New Mexico. On June 29, 1976, that court issued its opinion reversing the Commissioner of Revenue and holding that the tax burdened the self-government of the Navajo Tribe.

On July 15, 1976, the Petitioner filed a petition with the

Supreme Court of the State of New Mexico asking review of the opinion and judgment of the Court of Appeals and raising the federal questions, in somewhat different form, involved in this petition. Until then the Petitioner had no opportunity to present argument on two of the questions raised in this petition. By an order dated July 27, 1976, the New Mexico Supreme Court declined to review the case.

Even though the corporation is substantially inactive, the case is not moot because funds from a liquidation of certain assets of the corporation are being held in a joint account under the mutual control of the Petitioner and Respondent. The Petitioner was previously informed by counsel for the Respondent that the corporation might seek to become active again in the future. There is, thus, a live controversy between the parties to this case.

The Petitioner now seeks review by this Court of the decision of the Court of Appeals below. The Petitioner believes that this case is one of first impression before this Court.

REASONS FOR GRANTING THE WRIT

1. The Decision of The Court of Appeals Is Contrary To The Pre-emption Rules Established By This Court.

The Court of Appeals seized upon certain federal regulations concerning the Indian Business Development Fund to establish what it considered a "federal standard" for calling the Respondent "an Indian corporation".

By their terms, 25 U.S.C. Sec. 13 and the regulations cited by the Court do not conflict with state law. In fact, it is difficult to see what bearing they have on this case at all. The regulations singled out by the Court are concerned only with criteria for channeling capital grants and loans to businesses operated or owned by Indians. Moreover, the statute is a fifty-five year old general grant of authority to the Bureau of Indian Affairs to put funds into programs for tribal welfare.

This case stands in marked contrast to *Murray, et al. v. State of Washington, et al.*, 62 Wash.2d 619, 384 P.2d 337 (1963), app.dism. 378 U.S. 580, 84 S.Ct. 1910 (1964). There, it was held that a corporation created under guidelines of the Secretary of Defense *solely* to obtain loans to purchase construction of military housing under the Capehart Act, 69 Stat. 651, did not share the immunity from state sales taxes which the federal government enjoyed absent a specific declaration of the Congress.

Similarly here, the question is whether the broad provisions of 25 U.S.C. Sec. 13 and the regulations in issue pre-empt state jurisdiction over the Respondent absent evidence of specific congressional intent to do so. The Court of Appeals has said yes to this question. Which principle prevails? Does the Congress have to speak affirmatively to create a tax immunity – pre-empt state law – or not?

This Court has recently reaffirmed the principle that it is a *conflict* with federal statutes that requires state law to give way under the Supremacy Clause, U.S. Const., Art. VI, Cl. 2. *Moe v. The Confederated Salish and Kootenai Tribes of The Flathead Reservation, et al.*, ____ U.S. ____, 96 S.Ct. 1634 (1976). In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 84 U.S. 35, S.Ct. 1254 (1966), this Court reiterated its position that conflicts between state and federal law should not be sought out where they do not clearly exist. The Court of Appeals has done just the opposite. It has manufactured a conflict between New Mexico's law regarding corporations and the application of the gross receipts tax to a New Mexico corporation, and federal law dealing with formation of businesses by Indians eligible to receive grants.

Absent any discernible conflict between the federal regulations and the application of the tax in question, there is no basis for the Court of Appeals to override state law which is clearly applicable to Eastern Navajo Industries, Inc. as a corporate domiciliary of the State of New Mexico. Even if a conflict existed, it is beyond the proper authority of the Congress to partition state law so that a state is powerless to

regulate that which it franchises and upon which it confers benefits, in this case, a business corporation.

The Court of Appeals has reduced the Respondent to a mere aggregation of individual Indians, entirely disregarding the corporate structure in part on the strength of federal provisions permitting state corporations to receive funds if 51% of their shares is owned by Indians. Because this is a highly questionable interpretation of federal law, this Court should review the decision.

2. There Is A Conflict Between The New Mexico Court of Appeals And The Court of Appeals For The Fifth Circuit Concerning The Effect of Incorporation of Businesses By Indians Under State Law.

There is a conflict between the present case and *United States v. State Tax Commission of The State of Mississippi,* 505 F.2d 633 (5th Cir. 1974). In the latter case, a corporation was formed at the behest of the leadership of the Mississippi Band of Choctaw Indians to engage in construction work. The corporation, Chata, contracted with the Choctaw Housing Authority to build homes. The State Tax Commission pressed Chata to file returns and pay sales taxes derived from its construction. After proceedings were begun by the State of Mississippi to enforce its tax claim, the United States brought suit to enjoin the Tax Commission from taking any action to collect the sales taxes.

In considering the matter of corporate status, the Fifth Circuit observed:

> The benefits and privileges of such a charter had been sought and obtained when there could have been no doubt about the status imposed upon corporations by law. The law of Mississippi is that a corporation 'is an entity separate and distinct from its stockholders', [citations omitted]. Thus in an effort to avoid the taxes which Mississippi corporations are required to pay, Chata has cast itself in the untenable role of claiming the benefits and denying the burdens of the status which its incorporators voluntarily sought. 505 F.2d at 637

The Court went on to say:

> The corporate fiction is not to be disregarded because of mutuality of corporate names, stockholders and officers. The fact that one entity owns all the stock in the other is not determinative. The test is whether Chata *as a corporation actively owned and conducted its own business.* [Emphasis added] 505 F.2d at 637

Finally, while holding that the Band was not a recognized Indian tribe occupying a reservation set aside for its use, the Fifth Circuit separately held that the corporation in question was an entity separate and distinct from the Band. 505 F.2d at 638.

Contrary to the situation in the present case, the United States took an active part in the Fifth Circuit case because the Department of the Interior recognized the Band as a tribe. Federal legislation had been enacted for the benefit of individual Choctaws. In its opinion denying the government's motion for rehearing, 535 F.2d 300 (5th Cir. 1976), the Court refers at length to federal legislation and congressional proceedings dealing with the Choctaws in Mississippi.

The circumstances of the present case and the Fifth Circuit decision are substantially similar. On the issue of the effect of incorporation under state law, the two courts are in conflict. The New Mexico court disregarded the corporate status and merged the Respondent with its Indian shareholders while the federal court gave full recognition to the legal status of the corporation as a distinct person. Which court is correct? We believe that this question should be answered by this Court.

3. The Decision of The Court of Appeals As It Concerns Interference With Tribal Self Government Conflicts With Decisions of This Court Concerning Taxation of Non-Indians.

The Petitioner has proceeded throughout this case on the assumption that the Respondent, being a New Mexico corporation, is not an "Indian". No provision in Title 25 of the United

States Code of which we are aware defines an Indian as anything but a natural person. It is evident that the Respondent is not, in law or fact, an Indian. Thus, the Buck Act, 4 U.S.C. Sec. 109, is irrelevant to this case. With or without the Buck Act, the states have authority over non-Indians as the cases cited below affirm.

The authority of the states to tax non-Indians or exercise jurisdiction over them generally has been accepted in numerous cases from as early as *Thomas v. Gay,* 169 U.S. 264, 18 S.Ct. 340 (1898). This Court has not retreated from that position. Both *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 165, 93 S.Ct. 1257 (1973) and *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267 (1973) cite cases upholding state jurisdiction over non-Indians on reservations. This Court also upheld a state income tax levied against a lawyer employed by the Navajo Tribe even though federal regulations were in force concerning the hiring of such attorneys. *Kahn v. Arizona State Tax Commission,* 16 Ariz.App.17, 390 P.2d 846 (1971), appeal dismissed 411 U.S. 941, 93 S.Ct. 1917 (1973).

In *Moe, supra,* this Court sanctioned an affirmative burden on reservation Indians to collect and pay over a sales tax imposed on non-Indian purchasers. Here, the tax is levied *only* against a corporation, and no Indian has any affirmative burden placed upon him.

In short, the tax is levied against a non-Indian, the Respondent corporation. The Respondent is exactly what it appears to be; it is a private, for-profit, business corporation. How does the tax in question, assessed against the Respondent, interfere with tribal self-government?

That the economic burden of the tax might fall on the Navajo Tribe (or the federal government) is no basis for finding interference with tribal self-government. Under the test established by this Court in *First Agricultural National Bank v. State Tax Commission,* 392 U.S. 339, 88 S.Ct. 2173 (1968), the legal incidence of the gross receipts tax is upon the Respondent. *United States v. State of New Mexico, Bureau of Revenue,* No.

75-425-B Civil (D.C.N.M. July 1, 1976), appeal pending. Indeed in *Mescalero Apache Tribe v. Jones, supra,* a direct tax on a *tribal enterprise* was upheld, and again, it was the same tax involved in the present case. Clearly, the assessment in this case, having only a potential effect on the Navajo Tribe, can hardly be said to be an impermissible interference with tribal self-government.

This Court should, therefore, resolve the apparent conflict with its decisions presented by the opinion of the Court of Appeals.

4. The Court of Appeals Below May Have Erroneously Relied Upon Federal Legislation Passed After The Assessment Periods In Question.

The Court of Appeals refers to the "Indian Business Development Fund Act" as requiring explicit recognition of the ethnicity of the Respondent's shareholders. The Court said:

> To disregard the Indian ethnicity of taxpayer's shareholders would be to fail to recognize the specific *directives* of the Indian Business Development Act. That is to say *we must look beyond the taxpayer's corporate form* to the fact that 51% of its stock is owned by individual Navajo Indians. Consequently, there is no alternative but to view the assessment by the Bureau of Revenue as a tax upon Indians doing business upon an Indian land or reservation. (Appendix A p. A7) [Emphasis added]

The act referred to by the Court does not exist under that name. However, the 93rd Congress enacted the Indian Financing Act of 1974. P.L. 93-262, 88 Stat. 77, 25 U.S.C. Secs. 1451 through 1543. If this is the act which the Court of Appeals had in mind, state law was pre-empted by a federal law which did not exist at the time of assessment!

Assuming, *arguendo,* that the 1974 legislation were contemporaneous with the periods covered by the assessment in this case, two questions would immediately arise: To whom are the Act's "directives" aimed, and why must we "look beyond the

taxpayer's corporate form?" The legislation, just as the regulations under 25 U.S.C. Sec. 13, is silent on the matter of taxes or state jurisdiction generally. Furthermore, had the Congress any intention of creating a tax immunity for enterprises funded by the 1974 act, it would have said so.

Therefore, to the extent that the Court of Appeals relied on legislation enacted after the events in this case, such reliance is plain error. State law cannot be pre-empted by legislation which did not exist at the time of state action, and congressional intention to pre-empt the normal operation of state law must be readily apparent in any event.

CONCLUSION

For the reasons expressed herein, the Petitioner respectfully asks that this Court issue a writ of certiorari to the Court of Appeals of the State of New Mexico.

TONEY ANAYA
Attorney General of the
State of New Mexico

VERNON O. HENNING
Special Assistant Attorney General

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO
June 29, 1976

EASTERN NAVAJO INDUSTRIES, INC.,
Appellant,

v.

No. 11038

BUREAU OF REVENUE,
STATE OF NEW MEXICO,
Appellee.

OPINION

HERNANDEZ, Judge.

Taxpayer, Eastern Navajo Industries, appeals pursuant to Sec. 72-13-39, N.M.S.A. 1953 (Repl. Vol. 10, Supp. 1975), a Decision and Order of the Commissioner of the Bureau of Revenue assessing gross receipts to this taxpayer.

The fundamental issue in this appeal is whether incorporation by the taxpayer under our Business Corporation Act, Section 51-24-1 to 51-31-11, N.M.S.A. 1953 (Repl. Vol. 8, pt. 1, Supp. 1975) will preclude consideration of the Indian ethnicity of its stockholders in determining the correctness of the Bureau of Revenue's assessment.

Most of the pertinent facts are set out in the Commissioner's Decision and Order:

"2. The taxpayer is a New Mexico corporation incorporated pursuant to New Mexico law with offices and a plant at Church Rock, New Mexico. The plant and offices are not located on the Navajo Reservation but are located on "trust" land owned by the United States. The trust land is administered by the Navajo Tribe.

"3. The taxpayer entered into contracts with the Navajo Housing Authority (Authority) to construct houses on the

Navajo Indian Reservation. The Authority was to be the purchaser of the houses. The Authority was an entity created and organized under ordinances of the Navajo Indian Tribe.

"6. The funds of the Authority which it used to pay the taxpayer under the contracts referred to in paragraph 3 above were received by the Authority from the United States.

"7. The stock of the taxpayer was owned as follows: 51% by individual Navajo Indians; 49% by two individuals – Mr. Taylor and Mr. McKinney – who are not Navajo Indians although these individuals are related by blood with other Indian tribes. Messrs. Taylor and McKinney were officers of the corporation and on the Board of Directors. Three Navajo Indians were directors and officers of the taxpayer.

"9. The protested portion of the assessment relates to receipts by the taxpayer from building houses on that part of the Navajo Reservation located within the State of New Mexico. These houses were built for the Authority and were designed to be occupied by members of the Navajo Tribe."

The taxpayer raised four points of error. We find the third dispositive of this appeal: III) "The State of New Mexico cannot impose or collect a gross receipts tax on taxpayer since such a tax is a severe burden upon and a hindrance to the self-government of the Navajo Tribe."

The position of the Bureau has two aspects. The Bureau argues that "[o]rganizing a modern business corporation, the character of which is determined by state law, is a departure from the ancestral customs and folkways of Indian people. Once that step has been taken, the participants have made the choice, for better or worse, to separate themselves, at least for purposes of the corporate activity, from those traditions." The second point argued by the Bureau is that "[n]othing in the record even arguably supports a conclusion that tribal self-government is being hindered. There is no conflict between the State of New Mexico assessing the gross receipts tax against Eastern Navajo and the Tribe's efforts to provide housing for its people." We do not agree.

Other facts important to our determination appear in the record. The corporation was formed at the instigation and under the auspices of the Navajo Tribal Council. Messrs. Taylor and McKinney were approached by members of the Chairman's Office of the Navajo Tribe and by the Eastern Navajo Agency, a division of the Bureau of Indian Affairs. The Eastern Navajo Agency assembled the 54 Indians necessary to comprise the 51% Indian shareholder majority. Mr. McKinney testified, "We had nothing to do as far as what Indian received any stock. These names were given to us and the amount of stock to be issued to each one of them by the Navajo Tribe and the Eastern Navajo Agency." These shareholders bought stock in the company with loans from the federal government under a program designed to facilitate Indian self-help. McKinney testified: "We had to qualify through the Federal Housing Administration as an Indian-owned organization, . . . we have that certificate of qualification."

Further testimony established that the funds used by the Navajo Housing Authority to form the corporation were obtained from the Indian Business Development Fund. We take judicial notice of 25 C.F.R. Sec. 80 (1971), which sets out the provisions of the Indian Business Development Fund, as authorized by 25 U.S.C. Sec. 13 (1970):

"80.2 *Purpose and scope.* This part sets forth the regulations for the administration of the Indian Business Development Fund. The purpose of the fund is to stimulate Indian entrepreneurship and employment. This purpose is achieved by providing non-reimbursable, supplemental capital grants to establish profit-making Indian economic enterprises which will employ Indians."

"80.12 *Indian groups.* Any group of eligible individual Indians which may legally engage in private enterprise may apply for a grant. *This includes Indian corporations organized under Federal or State law* and, if authorized to enter contracts on behalf of an Indian tribe, those organizations commonly known as 'Tribal Enterprises,' which are economic enterprises. However, for *Indian corporations,*

fifty-one percent [51%] or more of the stock must be owned by eligible Indians or by an Indian tribe." [Emphasis ours.]

Under project requirements, these regulations provided:

"80.41 *Eligibility requirements.* The project must satisfy all the following requirements to be eligible for consideration:

(a) It is a profit-making enterprise which generates jobs for Indians.

(b) It is owned or controlled by an Indian group or an individual Indian.

(c) It is located on a reservation or in the immediate vicinity . . . .

(d) It must have the potential to become a profitable operation within the total cost of establishing the business. . . ."

"80.62 *Authority of Area Director.* Area Directors are authorized to determine eligibility of *Indian groups* not serviced by a single Superintendent, to receive their applications, and to recommend approval or disapproval of the application to the Commissioner [of Indian Affairs]." [Emphasis ours.]

Incorporation of this taxpayer is consistent with the method of incorporation sanctioned by Navajo tribal law for purposes of qualifying for tribal loans. Title 5, N.T.C. Sec. 211, which states that the purpose of this subchapter of the Code is "to establish procedures to govern all future loans by the Tribe to members, cooperative and private corporations," defines a "private corporation" as a:

> ". . . corporation organized by a group of Tribal members, or by Tribal members and others, pursuant to the laws of the United States or of states within which the Navajo jurisdiction extends and wherein the business or undertaking is to be located. The majority of stock of such corporation must be owned by Tribal members."

Thus, federal regulations defining federal loan policy for Indian enterprises and the Navajo Tribal Code specifically authorize incorporation of an Indian commercial enterprise under state law without the corresponding loss of "Indianess" that is argued by the Bureau of Revenue in the instant case.

We also take judicial notice of the following sections of the Navajo Tribal Code covering regulation and control of businesses within the Navajo Nation and community development:

The Code at Title 5, N.T.C. Sec. 51 states:

> "The Navajo Tribal Council, in order to promote the further economic development of the Navajo People, and in order to clearly establish and exercise the Navajo Tribe's authority to regulate the conduct and operations of business within the Navajo Nation, hereby declares that the Navajo Tribe of Indians has the sole and exclusive authority to grant, deny, or withdraw the privilege of doing business within the Navajo Nation, except where such authority is withdrawn from the Navajo Tribe by the Constitution and applicable laws of the United States."

The Code at Title 6, N.T.C. Sec. 354 states:

> "The [Navajo Housing] Authority shall be organized and operated for the purposes of: (1) Remedying in the areas subject to the jurisdiction of the Navajo Tribe unsafe and insanitary housing conditions, that are injurious to the public health, safety and morals; (2) Alleviating the acute shortage of decent, safe and sanitary dwellings for families of low income; and (3) Providing employment opportunities in areas subject to the jurisdiction of the Navajo Tribe through the reconstruction, improvement, extention, alteration or repair and operating of low-rent dwellings."

The Bureau refers to *United States v. State Tax Com'n. of State of Miss.*, 505 F.2d 633 (5th Cir. 1974) in support of its position: In that case, the United States brought suit on behalf of the Mississippi Band of Choctaw Indians to enjoin the Mississippi State Tax Commission from assessing and collecting a sales tax from a non-profit corporation formed under the laws of the

State of Mississippi. The corporation was established for the purpose of building houses under contract with the Choctaw Housing Authority. The court, after indugling in a considerable amount of dicta, determined that the federal district court was without jurisdiction to entertain the suit because there was in fact no existing Mississippi Band of Choctaw Indians.

It is a portion of this dicta that the Bureau calls to our attention. The Court of Appeals for the Fifth Circuit noted:

> "The Mississippi rule is the same as the general rule, that a corporation is a creature of the law and it is a legal personality, separate and apart from its owners. [Citations omitted.]
>
> * * * *
>
> Thus, in an effort to avoid the taxes which Mississippi corporations are required to pay, [the corporation] has cast itself in the untenable role of claiming the benefits and denying the burdens of the status which its incorporators voluntarily sought."

That a corporation and its stockholders are separate entities is the law in New Mexico as well. However, it is also the law in New Mexico that a court is not always bound to regard the legal status of a corporation as an existence in itself regardless of its stockholders. Our Supreme Court in *State T. & A., et al. v. Hermosa L. & C. Co.*, 30 N.M. 566, 572, 240 P. 469, 472 (1925) quoted with approval the following from Thompson on Corporations, Sec. 10:

> "The proposition that a corporation has an existence separate and distinct from its membership has its limitations. It must be noted that this separate existence is for particular purposes. It must also be remembered that there can be no corporate existence without persons to compose it; there can be no association without associates. This separate existence is to a certain extent a legal fiction. Whenever necessary for the interests of the public or for the protection or enforcement of the rights of the membership, courts will disregard this legal fiction and operate upon both the corporation and the persons composing it."

Even if the above quotation from *United States v. State Tax Com'n. of State of Miss., supra,* were not obiter dictum, we could not follow it for the reason that 25 C.F.R. Sec. 80.12, *supra,* explicitly requires consideration of the ethnicity of the stockholders of corporations who would qualify under its terms: ". . . for Indian corporations, fifty-one percent [51%] or more of the stock must be owned by eligible Indians or by an Indian tribe." Under this federal standard, taxpayer is an Indian corporation.

To disregard the Indian ethnicity of taxpayer's shareholders would be to fail to recognize the specific directives of the Indian Business Development Fund Act. That is to say we must look beyond the taxpayer's corporate form to the fact that 51% of its stock is owned by individual Navajo Indians. Consequently, there is no alternative but to view the assessment by the Bureau of Revenue as a tax upon Indians doing business upon an Indian land or reservation. And as we stated in *Hunt v. O'Cheskey*, 85 N.M. 381, 512 P.2d 954 (Ct. App. 1973):

> "New Mexico's attempt to tax the gross receipts of an Indian whose business is carried on exclusively upon reservation land is an attempt to determine what business may be carried on within the reservation. Such an attempt is an attempt to interfere with Indian self-government.
>
> . . . New Mexico does not have the authority to tax the privilege of an Indian to engage in business on an Indian reservation."

We believe that some comment concerning the Buck Act, 4 U.S.C. Sec. 105 is necessary in the consideration of this matter.

Section 105(a) provides:

> "No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full

> jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

Section 109 provides:

> "Nothing in Sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

The Supreme Court of the United States in *McClanahan v. Arizona State Tax Com'n.*, 411 U.S. 165, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) interpreted the Buck Act as follows in deciding an income tax assessment by the State of Arizona:

> "Indeed, Congress' intent to maintain the tax-exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. Sec. 105 *et seq.*, which provides comprehensive federal guidance for state taxation of those living within federal areas. . .[B]ut Sec. 109 expressly provides that '[n]othing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' To be sure, the language of the statute itself does not make clear whether the reference to 'any Indian not otherwise taxed' was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to exempt reservation Indians from coverage of the Buck Act. . . ."

Holding as we do, that taxpayer is Indian, it is apparent that the taxpayer is exempt from the operation of the Buck Act.

A case recently reviewed by the Court of Appeals, *G. M. Shupe, Inc. v. Bureau of Revenue*, No. 2183, 89 N.M. 265, 550 P.2d 277 (1976), is readily distinguishable from the present case. The taxpayer in *Shupe* is a Washington corporation, qualified to do business in New Mexico. It is constructing a dam on the Nambe Pueblo under contract with the U.S. Department of the Interior, Bureau of Reclamation. The taxpayer presented the issue that the gross receipts tax was illegally imposed

because taxpayer's activities were on Indian land. This court held that the tax was correctly assessed to this corporation for two reasons: (1) taxpayer corporation was not an Indian entity, and (2) the imposition of the tax does not infringe on Indian rights of self-government.

Our holding in the present case is the converse: Eastern Navajo Industries is an Indian entity, according to federal definition, so that the imposition of the gross receipts tax on this taxpayer constitutes an interference with Indian self-government.

The Commissioner was in error in his Decision and Order for the reasons stated above and consequently the assessment is annulled.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, Judge (dissenting).

The majority opinion has adopted a principle of law unknown in American jurisprudence on Indian law – that a domestic business corporation which services an Indian tribe is exempt from the provisions of the Gross Receipts Tax Act because the imposition of the tax is a severe burden on the self-government of an Indian tribe. I dissent.

A. *Facts Most Favorable To Decision*

Taxpayer is a New Mexico business corporation with offices and a plant at Church Rock, New Mexico. The plant is located on "trust" land owned by the United States and administered by the Navajo Indian Tribe.

Taxpayer is a private manufacturer of modular and prefabricated homes; it was not an agent, an agency, or any instrumentality of the governing body of the Navajo Tribe or the United States. Fifty-one percent of the corporate taxpayer is owned by individual Navajo Indians, and forty-nine percent is owned by Taylor and McKinney, officers of the corporation. Taxpayer qualified under 25 C.F.R. Sec. 80.12 to obtain a federal grant, the money to be used in performing services for the Navajo Housing Authority.

Taxpayer entered into contracts with the Navajo Housing Authority. One was an Agreement of Sale, which provided that taxpayer would sell structures to Navajo Housing Authority "to be built on real property . . . situated at several locations on NAVAJO TRIBAL LANDS . . . ." The other was a Contract of Sale, which provided for the sale of a completed "Property" which consisted principally of eighty dwelling units ". . . upon lands situated in Navajo, New Mexico and Church Rock, New Mexico . . . ."

Taxpayer purchased the raw materials, constructed the component parts, and assembled them into modular and prefabricated units. The modular home was a unit completed in sections at the plant, and hauled out on a trailer, with the sections assembled on the reservation. The prefabricated home

was built in component parts, which were taken to the reservation and assembled.

Thereafter, taxpayer did its excavation and dirt work and completed the building of the homes on the Indian reservation.

B. *The imposition of a tax on a domestic corporation, if a severe economic burden upon the Navajo Tribe, the tax does not affect the self-government of the Tribe.*

The majority opinion reverses the Commissioner because the imposition of the gross receipts tax is a severe burden upon and a hindrance to the self-government of the Navajo Tribe. The opinion is based upon the ethnicity of the Indian stockholders of taxpayer who qualify taxpayer under 25 C.F.R. Sec. 80.12 to borrow money from the federal government. The argument is syllogistic. For purposes of obtaining a federal grant to engage in rendering services to the Navajo Housing Authority, taxpayer is an "Indian corporation". The Navajo Housing Authority shall improve low rent dwellings. Therefore, the gross receipts tax imposed on taxpayer is a severe burden upon the self-government of the Navajo Tribe.

The tax is not imposed on Indians or Indian lands. It is imposed on taxpayer. It has no effect upon the self-government of the Tribe. If the Navajo Tribe desires to pay the tax, the tax may become an economic burden.

The concept proposed by the majority opinion appears to be a matter of first impression in the United States. No authority was cited and none has been found that an "Indian corporation", organized under the corporate laws of New Mexico, and engaged in private enterprise, is exempt from the payment of a gross receipts tax, because this payment by the corporation is a severe economic burden on an Indian tribe.

To approve this concept as a rule of law means that the government and people of this State must forego the economic benefit.

I return to the philosophical rule stated in my concurring

opinion in *G. M. Shupe, Inc. v. Bureau of Revenue,* No. 2183, 89 N.M. 265, 550 P.2d 277 (Ct. App.), decided April 13, 1976; cert. denied, 89 N.M. ____, 551 P.2d 1368 (1976). Even if the imposition of the tax affected Indian self-government, when the existence of an Indian tribe within this State obstructs the operation of state laws and the welfare of its citizens, the inherent sovereignty of the tribe must give way. Taxpayer must pay the tax for the welfare of the government and the people in New Mexico because this economic benefit takes precedence over the burdens of the Indians on the reservation. The federal government is burdened with, and should assist in, the economic development of the Indians on the reservation. It does this by loaning taxpayer large sums of money to engage in services on and off the Indian reservation for the benefit of the Indians. If taxpayer was a unit created under the Navajo Tribal Code, taxpayer would not be subject to the tax.

It has been held that New Mexico, in terms of its general power, has the right to tax all Indian land and Indian activity located or occurring outside of an Indian reservation, *unless Congress forbade it.* This tax was imposed on the Mescalero Apache Tribe ski resort built on federal land. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). Surely this tax was a severe economic burden on the tribe and interfered with its self-government. If an Indian tribe can be taxed for business conducted on federal land with non-Indians, then a non-Indian domestic corporation engaged in business on trust lands, which renders services to an Indian tribe on the reservation, is also subject to the tax. Indian and non-Indian business relationships are subject to state taxes, except where the non-Indian engages in business on the Indian reservation, or the non-Indian engages in business as an agency of the tribe.

Congress did not forbid New Mexico to impose a tax on a state "Indian corporation" referred to by this name in 25 C.F.R. Sec. 80.12.

In *Palm Springs Spa, Inc. v. County of Riverside,* 18 Cal.App. 3d 372, 95 Cal.Rptr. 879 (1971), the Court said:

> It cannot be said that the taxation of the possessory interest of non-Indians on federal land held in trust for Indians is an area inherently requiring uniform national regulation. Indeed, the United States Supreme Court has recognized the ability of local authorities to impose taxes of certain types on the activities of private persons conducted on Indian trust or other federal land. [Citations omitted.]
>
> *Neither can we find evidence of a congressional intent to preempt the field of regulating commercial activities between Indians and non-Indians.* [Emphasis added.] 95 Cal.Rptr. at 883.

C. *New Mexico has jurisdiction to impose a gross receipts tax.*

Taxpayer contends that the State of New Mexico does not have jurisdiction to impose a gross receipts tax on a corporation operating within the lands of the Navajo Tribe.

First, it is now firmly established that New Mexico has jurisdiction to tax a foreign corporation, authorized to do business in New Mexico, whose work is performed on Indian lands. *G. M. Shupe, Inc. v. Bureau of Revenue, supra.*

Taxpayer agreed to sell houses to Navajo Housing Authority "to be built on real property . . . situated at several locations on NAVAJO TRIBAL LANDS . . . ." Taxpayer built the houses on "trust" land and on the reservation. "It is common ground here that *Indian conduct* occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities." [Emphasis added.] *DeCoteau v. District County Court,* 420 U.S. 425, 428, 95 S.Ct. 1082, 1085, 43 L.Ed.2d 300, 305 (1975). Taxpayer is not an Indian. It rendered the service necessary to fix the houses for use on the reservation. To build a building means to erect a structure fixed on the soil. *State v. Orenelas,* 42 N.M. 17, 74 P.2d 723 (1937); *Board of Com'rs of Guadalupe County v. State,* 43 N.M. 409, 94 P.2d 515 (1939). Taxpayer accomplished this fact. It fixed the houses on the soil.

In *Hunt v. O'Cheskey*, 85 N.M. 381, 387, 512 P.2d 954, 960 (Ct. App. 1973), this Court said:

> Taxation is largely a matter of jurisdiction. As early as 1819 the Supreme Court pointed out that there are limits to a State's power to tax, that taxation power, flowing from jurisdiction,
>
> > "* * * is an incident of sovereignty, and is co-extensive with that to which it is an incident. *All subjects over which the sovereign power of a State extends, are objects of taxation;* but those over which it does not extend are, upon the soundest principles, exempt from taxation."
>
> *M'Culloch v. Maryland*, 4 Wheat. 315, 4 L.Ed. 579 (1819). Similarly, a noted authority on Indian law has commented, "To the extent that *Indians and Indian property within an Indian reservation are not subject to State laws, they are not subject to State tax laws.*" F. Cohen, Handbook of Federal Indian Law 254 (1970). [Emphasis added.]

For a further discussion of "The State's Power to Tax", see Price, Law and the American Indian, pp. 251 to 276 (1973).

Taxpayer is a corporation over which the sovereign power of a state extends.

Second, a domestic private business corporation, controlled by Indians, falls within the same status and category as all other private business corporations that do business with an Indian tribe. The racial, religious or national origins of stockholders have no effect on the character of a corporate business entity. Taxpayer claims that a corporation controlled by Indians makes the corporation an "Indian" on the same level as an incorporated pueblo. I can understand its pride, albeit not its phylogeny. Taxpayer cannot direct us to any instance in American Indian history where a private business corporation controlled by Indians evolved into an entity which it calls "Indianness". For incorporated pueblos and federal Indian chartered corporations, see *Mescalero Apache Tribe v. Jones*, 83 N.M. 158, 489 P.2d 666 (Ct.App. 1971) (Sutin, J., concurring opinion, rev'd

in part, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). The gross receipts tax assessed on the Mescalero Apache Tribe was affirmed.

A corporation and stockholders of a corporation are separate entities, *Shillinglaw v. Owen Shillinglaw Fuel Company*, 70 N.M. 65, 370 P.2d 502 (1962), for tax purposes. *Coca-Cola Bottling Co. of Gallup v. United States*, 443 F.2d 1253 (10th Cir. 1971). This same principle applies to a domestic corporation with Indian stockholders which voluntarily chooses to engage in business in corporate form. It cannot seek the benefits of state corporate law and deny the burden of the status which its incorporators voluntarily sought. *United States v. State Tax Com'n of State of Miss.*, 505 F.2d 633 (5th Cir. 1974). Taxpayer wants all of the benefits of New Mexico corporate law, but it does not want to assume any of its burdens.

Third, imposition of a gross receipts tax on a domestic business corporation that builds homes on Indian lands does not constitute any control over Indian lands. Taxpayer seeks to place itself in the position of the Navajo Tribe to escape taxation. It relies on *Hunt v. O'Cheskey, supra.* This case holds that New Mexico may not tax gross receipts of *Indians residing on a reservation* when the gross receipts involved are derived solely from activities within the reservation. The reason is that the State, based on its lack of control over Indian lands, cannot determine what business may be carried on by *Indians* on an Indian reservation. See also, *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961).

Taxpayer, however, is not an "Indian", and cannot become one by clothing itself with the apparatus of a domestic business corporation.

D. *Taxpayer was not entitled to deduction of gross receipts.*

Taxpayer seeks relief under Sec. 72-16A-14.9, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, 1973 Supp.). It provides in part:

> "Receipts from selling tangible personal property . . . to the governing body of any Indian tribe or Indian pueblo

for use on Indian reservations or pueblo grants, may be deducted from gross receipts.

Taxpayer claims that its receipts are deductible because it sold modular and prefabricated houses, i.e., tangible personal property, to the Navajo Housing Authority.

We must determine what is meant by taxpayer "selling tangible personal property" to the Navajo Housing Authority. By definition, " 'selling' means any transfer of [tangible personal] property for consideration *or any performance of service for consideration.*" [Emphasis added.] Section 72-16A-3(B), (I).

(1) A house which is affixed to the soil on the Navajo reservation is not tangible personal property. It is real property. (2) To construct is to build in the ordinary course of business, and a construction activity is a "service", and all tangible personal property is a component part of that service. Section 72-16A-3(C), (K).

This means that, when a taxpayer *builds* a home, this constitutes a "service". In rendering this service, all tangible personal property that goes into the *assembly* of the home, such as the sections, trusses, roofing, nails, etc., become a component part of the *building* process.

In the instant case, taxpayer was engaged in rendering a service, not in the business of selling tangible personal property. Taxpayer would be engaged in selling tangible personal property if it sold the component parts of the home to the Navajo Tribe, and the Tribe built the homes on the reservation. Under some limited factual situations, taxpayer's receipts could result "from selling tangible personal property . . . to the governing body of" the Navajo Tribe within the meaning of Sec. 72-16A-14.9, *supra.*

The Commissioner decided that "The taxpayer entered into contracts with the Navajo Housing Authority (Authority) *to construct houses on the Navajo Indian Reservation* . . . The modular or prefabricated units were used by the taxpayer in *building houses on the Navajo Reservation.*" [Emphasis added.] Taxpayer did not contest the emphasized language.

This decision is supported by substantial evidence. Taxpayer was not only a manufacturer who made and assembled component parts of the house, assembled and sold the houses, but it built the houses on the Navajo Reservation. It was in the "construction" business and rendered a "service".

Taxpayer relies on *Evco v. Jones,* 81 N.M. 724, 472 P.2d 987 (Ct.App. 1970); 83 N.M. 110, 488 P.2d 1214 (Ct.App. 1971), rev'd on other grounds, 409 U.S. 91, 93 S.Ct. 349, 34 L.Ed.2d 325 (1972). For an analysis of *Evco,* see *Advance Schools, Inc. v. Bureau of Revenue,* 89 N.M. 633, 548 P.2d 95 (Ct.App. 1975) (Sutin, J., dissenting); rev'd, 89 N.M. 79, 547 P.2d 562 (1976).

Evco was engaged in business as a designer or creator of instructional or educational programs. It entered into contracts with agencies of the federal government. These items constituted sales of *finished* items, i.e., tangible personal property. Receipts from these sales were exempt from the gross receipts tax because the principal objective of the contracts was to secure from the taxpayer the *finished* items. Services were merely incidental. The reverse is true in the instant case. The principal objective of the contracts between taxpayer and Navajo Housing Authority was to secure from the taxpayer a service, the building of homes.

Taxpayer was not entitled to a deduction of receipts from selling the homes to the Navajo Tribe.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

EASTERN NAVAJO INDUSTRIES, INC.,
Appellant,

v. No. 11038

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,
Appellee.

PETITION FOR WRIT OF CERTIORARI

The Bureau of Revenue petitions this Court to issue a writ of certiorari to the Court of Appeals in the above-styled case. The decision of the Court of Appeals was filed on June 29, 1976. A copy of the opinion is annexed to this petition.

The questions presented for review are:

1. Whether the Court of Appeals erred in holding that the tax assessed against Eastern Navajo Industries, Inc. (hereinafter referred to as the "Taxpayer") unlawfully interferes with or burdens the self-government of the Navajo Tribe;

2. Whether the Court of Appeals was in error in looking to the ethnic origins of the shareholders of the Taxpayer and in disregarding the corporate identity of the Taxpayer in order to find an exemption from tax;

3. Whether the Court of Appeals erred in creating and applying a doctrine of pre-emption of state law not based on federal statutes, but based only on federal regulations and tribal ordinances.

Facts Material To The Questions Presented.

The Taxpayer is a private, for-profit corporation organized under the laws of the State of New Mexico. Forty-nine percent of the stock is owned by two non-Indians (one of whom is

now deceased) who managed the corporation. The remaining stock is held by individual Navajo Indians.

The Taxpayer entered into two contracts with the Navajo Housing Authority to construct single-family dwellings on the reservation. The Taxpayer's plant is located at Church Rock, New Mexico, near Gallup; the plant is located on trust land, not reservation land.

The assessment of gross receipts taxes against the Taxpayer arose as the result of the construction activities previously mentioned. No claim has been made by the Bureau against any shareholder for payment of the assessment.

Basis For Granting The Writ of Certiorari.

The decision of the Court of Appeals on the issue of interference with tribal self-government conflicts with this Court's opinion in *Sangre de Cristo Development Corporation, Inc. v. City of Santa Fe,* 84 N.M. 343, 503 P.2d 323 (1972). In that case, this Court recognized that the question of interference with tribal self-government is largely one of fact. Likewise, the Court of Appeals failed to recognize in this case the same point made in its recent decision in *G. M. Shupe, Inc. v. Bureau of Revenue,* Ct. App. No. 2183 (April 13, 1976).

Concerning the issue of looking through the corporation to its shareholders, the Court of Appeals decision conflicts with *American Automobile Association, Inc. v. Bureau of Revenue,* 87 N.M. 330, 533 P.2d 103 (1975). There, this Court stressed that it is the corporation which is engaging in business and upon which the tax is levied, not its members. In the present case, the Court of Appeals looks directly to the shareholders of the Taxpayer to determine if the Taxpayer is liable for the gross receipts tax.

The decision of the Court of Appeals conflicts with what this Court said in *Shillinglaw v. Owen Shillinglaw Fuel Company,* 70 N.M. 65, 370 P.2d 502 (1972), concerning recognition of the corporate identity, and this Court's interpretation of

State Trust & Savings Bank v. Hermosa Land & Cattle Company, 30 N.M. 566, 240 P. 469 (1925), concerning when the corporate identity will be disregarded.

In a recent case, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, ____ U.S. ____, ____ S.Ct. ____, 48 L.Ed.2d 96 (1976), the Supreme Court restated the established rule that state law must give way to federal laws regarding Indians only where there is a conflict between those laws. The Court of Appeals decision finds pre-emption where no federal statute is cited as being both controlling and in conflict with New Mexico law in this case. In essence, the Court seems to have created a new theory of pre-emption based merely on federal regulations and tribal law, not federal statute, where there is nothing in those provisions which conflicts with state law. Moreover, the concept of pre-emption by tribal law has not been accepted by any court. These issues raise both significant questions of law under the Constitution of the United States and are matters of substantial public interest.

ARGUMENT

The Court of Appeals explicitly holds in this case that the assessment of gross receipts tax against the Taxpayer interferes with tribal self-government. At p.2. However, the majority is clearly also applying a unique and novel theory of pre-emption. Both bases for its opinion are erroneous and this Court should reverse the Court of Appeals.

Neither the Court nor the Taxpayer has demonstrated how the tax assessed against the Taxpayer conflicts with or severely burdens the tribal government of the Navajos. Nothing in the record or the opinion supports the Court and there is strong evidence in the record to the contrary cited in the Bureau's Answer Brief at pp. 6 and 7. See *Sangre de Cristo Development Corporation v. City of Santa Fe, supra*, at 350-351; *G. M. Shupe, Inc. v. Bureau of Revenue, supra.*

No attempt is being made to tax the members of the tribe. The Taxpayer is a New Mexico corporation, organized by

private individuals to conduct business in this state. Its right to exist and the powers it enjoys as a corporation derive from the laws of this state.* Granting that the Tribe can exclude the corporations from its lands, it does not follow that the Navajos can enlarge or abridge the privileges which the corporation enjoys under state law. Nor can the Tribe confer immunity upon the corporation from payment of state taxes.

The Court reasons that if the Taxpayer is recognized as an "Indian business" for purposes of getting federal grants, the corporation possesses an ethnic identity. Since the ethnic identity is Indian, it follows that the corporation is an Indian and, therefore, the Taxpayer is exempt from state taxation based on *McClanahan v. Arizona State Tax Commission*, 411 U.S. 165, 93 S.Ct. 1257 (1973).

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*The United States Supreme Court has long recognized that corporations, as creatures of state law, are subject to the sovereign power of the state. *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370 (1906). The Court reaffirmed this principle in *Bellis v. United States*, 417 U.S. 86, 94 S.Ct. 2179 (1974). In *Hale*, a case dealing with whether the Fifth Amendment protected corporate records, the Court said:

> ". . . the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose." 201 U.S. at 74-75

It necessarily follows that sovereign power of a state over its "creature" extends to the power to tax the receipts of the corporation derived from activities within the borders of the state.

While it may be the case that the ethnic composition of a business enterprise is important to the Secretary of the Interior and the Navajo Tribe for purposes of channeling capital under a federal grant program, it does not follow that either the Secretary or the Tribal Council contemplated that a corporation organized under state law would be considered an Indian for other unrelated purposes. In fact, the references by the Court to federal regulations and tribal ordinances have no apparent relationship whatsoever to anything except funding.

United States v. State Tax Commission, 505 F.2d 633 (5th Cir. 1974), is directly on point. The corporation in that case was organized by the Mississippi Band of Choctan [sic] Indians. The Court held, among other things, that under the law of Mississippi, a corporation is separate and distinct from its shareholders. The New Mexico rule is the same – a corporation is an entity apart from its owners. *Shillinglaw v. Owen Shillinglaw Fuel Company, supra.* The Court of Appeals, however, reaches back fifty years to cite a case that discusses the circumstances under which the separateness of a corporation from shareholders will be disregarded. *State Trust & Savings Bank v. Hermosa Land & Cattle Company, supra.* At pp. 5 and 6. From both the context of the case and the references following the quotation cited by the Court of Appeals, it is clear that the case is irrelevant to this appeal. The Court is invoking principles which were meant to apply in situations where recognition of the corporate identity would promote fraud. *Shillinglaw v. Owen Shillinglaw Fuel Company, supra,* at p. 70. Moreover, the Court of Appeals fails to cite one instance in which the state of incorporation has had such a rule used *against* it.

Since the Taxpayer is not an Indian, the state is not taxing a reservation Indian on gross receipts earned on the reservation; the interference with tribal self-government issue fails and, therefore, *McClanahan, supra,* becomes irrelevant.

The Court has also disregarded what this Court said as recently as 1975 in *American Automobile Association, Inc. v. Bureau of Revenue, supra.* Concerning the issue of the meaning of Sec. 72-16A-3(E), this Court said:

> It is the American Automobile Association, Inc. which is "engaging in business."No one asserts that its members are so engaged. The definition section, Sec. 72-16A-3, subd. E, N.M.S.A. (Repl.Vol. 10 pt. 2, Supp. 1973) states:
>
> > E. 'engaging in business' means carrying on or causing to be carried on any activity for the purpose of direct or indirect benefit[.]
>
> Whom does this section refer to? Direct or indirect benefits to whom? Obviously to the taxpayer. It is talking about American Automobile Association, Inc., not about its members. It is a tortured construction of the language to say, construing the two-cited statutes together, that "engaging in business" under the statute imposing the tax obviously refers to the taxpayer and the definition of the same phrase in the definitional section means the members.

The Bureau is taxing the corporation in this case, not its owners. There is no basis for looking to the ethnic origins of the shareholders.

The Court of Appeals, by citing federal regulations implementing a grant program, seems to suggest that the application of the tax and the state statutes concerning corporations is pre-empted by federal law in this case. Citation to provisions of the Navajo Tribal Code suggests that the Court has adopted a rule of tribal pre-emption of state law.

The Court's theory on this point has been rejected by United States Supreme Court in the *Moe* case *supra.* There, the Court said, quoting from an earlier case:

> "Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments." 48 L.Ed.2d at 112.

The Secretary of the Interior has no authority to pre-empt state law nor has he attempted to do so in his regulations; neither does the Navajo Tribe have such authority. When this Court found pre-emption in *Sangre de Cristo Development Corporation, Inc. v. City of Santa Fe, supra,* it was in the face of

a clear congressional enactment dealing with land use planning on Indian lands. The Court of Appeals cites no instance of a palpable conflict between federal law concerning grants to Indians and the operation of any state statute in this case and none exists. Furthermore, there is no conflict between the regulations and tribal ordinances which the Court cited and the relevant provisions of state law in this case.

The Bureau, for the reasons stated in this petition, asks that this Court accept this case for review and reverse the Court of Appeals.

Respectfully submitted,

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Tuesday, July 27, 1976

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO
Petitioner,

vs.

EASTERN NAVAJO INDUSTRIES, INC.,
Respondent.

No. 11038

Original Proceeding on Certiorari

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises,

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Cause No. 2188 be and the same is hereby returned to the Clerk of the Court of Appeals.

APPENDIX D

BEFORE THE COMMISSIONER OF REVENUE
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE LIABILITY
OF EASTERN NAVAJO INDUSTRIES, INC.,
BUREAU OF REVENUE IDENTIFICATION
NUMBER 761581, PROTEST TO ASSESS-
MENT NUMBER 131454.

DECISION AND ORDER

A formal hearing was held on June 18, 1975, to consider the protest filed to Assessment Number 131454. Eastern Navajo Industries, Inc. (hereinafter referred to as "taxpayer") was represented by Thomas Hughes, Esq. The Bureau of Revenue was represented by Vernon Henning, Esq.

After considering the evidence, it is decided and ordered:

1. The taxpayer timely protested Assessment No. 131454.

2. The taxpayer is a New Mexico corporation incorporated pursuant to New Mexico law with offices and a plant at Church Rock, New Mexico. The plant and offices are not located on the Navajo Reservation but are located on "trust" land owned by the United States. The trust land is administered by the Navajo Tribe.

3. The taxpayer entered into contracts with the Navajo Housing Authority (Authority) to construct houses on the Navajo Indian Reservation. The Authority was to be the purchaser of the houses. The Authority was an entity created and organized under ordinances of the Navajo Indian Tribe.

4. The taxpayer purchased raw materials from suppliers and assembled this material into modular units or prefabricated units at its plant at Church Rock, New Mexico.

5. The modular or prefabricated units were used by the taxpayer in building houses on the Navajo Reservation.

6. The funds of the Authority which it used to pay the taxpayer under the contracts referred to in paragraph 3 above were received by the Authority from the United States.

7. The stock of the taxpayer was owned as follows: 51% by individual Navajo Indians; 49% by two individuals – Mr. Taylor and Mr. McKinney – who are not Navajo Indians although these individuals are related by blood with other Indian tribes. Messrs. Taylor and McKinney were officers of the corporation and on the Board of Directors. Three Navajo Indians were directors and officers of the taxpayer.

8. Mr. Taylor and Mr. McKinney had been in the construction business for a number of years prior to the audit period.

9. The protested portion of the assessment relates to receipts by the taxpayer from building houses on that part of the Navajo Reservation located within the State of New Mexico. These houses were built for the Authority and were designed to be occupied by members of the Navajo Tribe.

10. There is no dispute concerning the accuracy of the figures which led to the assessment; the taxpayer's position is that the gross receipts in question cannot be taxed by the State of New Mexico. The taxpayer contends, among other things:

a) The taxpayer was selling property to the Tribe or its agent and the receipts are deductible under Sec. 72-16A-14.9, N.M.S.A. 1953.

b) The taxpayer is a United States governmental instrumentality or an agent of the United States and the receipts are deductible under Sec. 72-16A-14.9.

c) The taxpayer's business activity was performed on an Indian reservation which cannot be taxed by New Mexico.

d) The taxpayer's business is in effect an Indian business which cannot be taxed by New Mexico.

e) The Buck Act (4 U.S.C.A. Secs. 1105 et seq.) precludes the tax.

11. Under the Gross Receipts and Compensating Tax Act (Act) construction is defined as a service. Section 72-16A-3(K). The taxpayer's gross receipts were derived from the sale of construction services not from the sale of property. Section 72-16A-14.9 is not applicable. There is no provision in the Act which grants an exemption or deduction for the taxpayer's gross receipts in question.

12. The tax in issue – the gross receipts tax – is imposed on the taxpayer, a New Mexico corporation. The tax is not imposed on the Navajo Tribe, the Navajo Housing Authority, or the United States.

13. The taxpayer was not an agent or an agency or an instrumentality of the governing body of the Navajo Tribe or the United States. Neither State nor Federal law prohibits the imposition of the gross receipts tax on this taxpayer who was engaged in business in New Mexico.

14. The fact that 51% of the stock of the taxpayer corporation is owned by individual Navajo Indians or that the majority of the directors of the corporation are individual Navajo Indians is not determinative of the tax status of the corporation, which was incorporated under the laws of the State of New Mexico. The gross receipts tax imposed here is on the corporation, not on its shareholders. The taxpayer is a taxable entity, and the receipts in question are subject to the gross receipts tax.

15. The Buck Act does not proscribe the taxing of this taxpayer.

16. The taxpayer relied, among other things, on *United States v. State Tax Commission,* (1973) D.C. Miss. No. 73,304. This district court case was reversed and remanded by the Fifth Circuit Court of Appeals, 505 F.2d 633 (December 13, 1974). The decision of the Court of Appeals supports the position of the Bureau of Revenue.

17. The assessed penalty is abated. The balance of the taxpayer's protest is denied.

Done this 17th day of July, 1975, in Santa Fe, New Mexico.

FRED L. O'CHESKEY, Commissioner of Revenue

APPENDIX E

25 U.S.C. Sec. 13. Expenditure of Appropriations by Bureau of Indian Affairs

The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education.

For relief of distress and conservation of health.

For industrial assistance and advancement and general administration of Indian property.

For extension, improvement; operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects.

For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.

For the suppression of traffic in intoxicating liquor and deleterious drugs.

For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.

And for general and incidental expenses in connection with the administration of Indian affairs.

APPENDIX F

SUBCHAPTER H – ECONOMIC ENTERPRISES

PART 80 – INDIAN BUSINESS DEVELOPMENT FUND

General

Sec. 80.1 Definitions.

As used in this part:

(a) The term "fund" means the Indian Business Development Fund.

(b) The term "Indian" means any person who is a member of any Indian tribe, band, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs.

(c) The term "economic enterprise" means any privately owned commercial, industrial, or business activity established or organized for the purpose of profit. Activities organized for governmental, religious, charitable, fraternal, social, or political purposes are not economic enterprises for the purposes of this part. Cooperatives or other privately owned enterprises which distribute profits to their customers are considered economic enterprises for the purposes of this part.

(d) The term "profit" is defined as the return on capital after deducting from income all expenses of doing business.

(e) The term "reservation" includes Indian reservations, former Indian Reservations in Oklahoma, and lands occupied by Alaska native communities.

(f) The term "Indian tribe" means any tribe, band, pueblo, group or community of Indians or Alaska natives recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs.

(g) The term "Commissioner" means the Commissioner of Indian Affairs or the official designated to act for him.

(h) The term "Area Director" means the official in charge of a Bureau of Indian Affairs Area Office or an official designated to act for him.

(i) The term "Superintendent" means the official in charge of a Bureau of Indian Affairs agency, Area field office, or other local office reporting to an Area Director.

Sec. 80.2 Purpose and scope.

This part sets forth the regulations for the administration of the Indian Business Development Fund. The purpose of the fund is to stimulate Indian entrepreneurship and employment. This purpose is achieved by providing nonreimbursable, supplemental capital grants to establish profit-making Indian economic enterprises which will employ Indians.

Sec. 80.12 Indian groups.

Any group of eligible individual Indians which may legally engage in private enterprise may apply for a grant. This includes Indian corporations organized under Federal or State law and, if authorized to enter contracts on behalf of an Indian tribe, those organizations commonly known as "Tribal Enterprises," which are economic enterprises. However, for Indian corporations, fifty-one percent (51%) or more of the stock must be owned by eligible Indians or by an Indian tribe.

Sec. 80.41 Eligibility requirements.

The project must satisfy all the following requirements to be eligible for consideration:

(a) It is a profit-making enterprise which generates jobs for Indians.

(b) It is owned or controlled by an Indian group or an individual Indian.

(c) It is located on a reservation or in the immediate vicinity, except in Alaska. In Alaska, preference will be given to projects

located within Native communities. In Oklahoma, only former reservation areas will be considered.

(d) It must have the potential to become a profitable operation within the total cost of establishing the business. There is no commitment to fund a project in succeeding years. Additional funds may be granted, however, where expansion is feasible.

Sec. 80.62 Authority of Area Director.

Area Directors are authorized to determine eligibility of Indian groups not serviced by a single Superintendent, to receive their applications, and to recommend approval or disapproval of the application to the Commissioner.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-576

BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,

Petitioner,

v.

EASTERN NAVAJO INDUSTRIES, INC.

Respondent.

MOTION OF VLASSIS, RUZOW & LINZER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITION NO. 76-576 AND BRIEF AMICUS CURIAE IN OPPOSITION TO CERTIORARI

GEORGE P. VLASSIS
LAWRENCE A. RUZOW
1545 West Thomas Road
Phoenix, Arizona 85015
Attorneys for
VLASSIS, RUZOW & LINZER

Of Counsel:

KATHERINE OTT

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF UNDER RULE 42 IN RESPONSE TO PETITION NO. 76-576

Pursuant to Rule 42 of the United States Supreme Court, Vlassis, Ruzow & Linzer respectfully move this Court for leave to file an amicus curiae brief herein on behalf of Respondent, Eastern Navajo Industries, Inc.

Petition for Certiorari was filed by the Bureau of Revenue of the State of New Mexico on October 23, 1976. Respondent, Eastern Navajo Industries, Inc., did not file a brief in opposition and on December 6, 1976, this Court requested a response. Respondent is a defunct corporation and the attorney representing it during the New Mexico state court litigation has declined further representation of the now non-existent entity before this Court.

The principal assets of Respondent were acquired by the Navajo Housing and Development Enterprise, an enterprise of the Navajo Tribe, and the Clerk of this Court contacted the attorney for Navajo Housing and Development Enterprise, Larry Lamb, Esq., who also declined to file a response on behalf of Eastern Navajo Industries, Inc.

The Clerk of the Court then approached our firm inquiring, whether as General Counsel for the Navajo Nation, we would assume representation of Eastern Navajo Industries, Inc. and file the response requested by the Court. Without the authorization of the Navajo Tribal Council, we are unable to act as attorneys for Eastern Navajo Industries, Inc., a New Mexico Corporation for profit, nor can we file an amicus brief on behalf of the Navajo Nation itself. The Navajo Tribal Council is not now in session nor will it reconvene before mid-April 1977 and until that time, we will be unable to obtain such authorization.

Nevertheless, the fact remains that a Court of Appeals of the State of New Mexico has broken with tradition and has construed state law in favor of an Indian entity and against the state Bureau of Revenue. This Court has devoted much of its time to reversing or vacating the decisions of state courts which have ruled against Indians. Bryan v. Itasca County, 426 U.S. 373 (1976); Antoine v. Washington, 240 U.S. 194 (1975); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), rev'd in part and aff'd in part; McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Tonasket v. Washington, 411 U.S. 451 (1973); Mattz v. Arnett, 412 U.S. 412 (1973); Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Seymour v. Superintendent, 368 U.S. 351 (1962); Metlakatla Indian Comm'n v. Egan, 369 U.S. 45 (1962); and Williams v. Lee, 358 U.S. 217 (1959). The New Mexico Bureau of Revenue, rather than seek redress in the state legislature, has chosen to submit to this Court a Petition for Certiorari requesting review of the state court decision. We believe this Court lacks the requisite jurisdiction for such a review, and even if there is jurisdiction, appropriate exercise of the discretion inherent in a Certiorari proceeding should preclude review.

With volunteers in apparent short supply to uphold the position of Eastern

Navajo Industries, Inc., with a decision bearing on the future of Indian businesses on the Navajo Reservation brought before this Court in a Petition for Certiorari, with this Court's December 1976 request for a response to that petition thus far unanswered, with the Navajo Tribal Council out of session until mid-April 1977, we respectfully request leave to file this amicus curiae brief on behalf of Respondent, Eastern Navajo Industries, Inc., in the sole name of our firm, Vlassis, Ruzow & Linzer.

Should this request be so unusual as to require a denial of this motion for leave to file an amicus curiae brief, we would respectfully request that this Court defer consideration of this motion until mid-April, at which time the Navajo Tribal Council will reconvene and will be able to consider its entry into this litigation on behalf of Respondent.

We, therefore, respectfully request permission to file this brief under Rule 42 of the Supreme Court of the United States.

Respectfully submitted,

GEORGE P. VLASSIS
LAWRENCE A. RUZOW
1545 West Thomas Road
Phoenix, Arizona 85015
Attorneys for
VLASSIS, RUZOW & LINZER

Of Counsel:
KATHERINE OTT

March 25, 1977

BRIEF AMICUS CURIAE FOR RESPONDENT, EASTERN NAVAJO INDUSTRIES, IN OPPOSITION TO CERTIORARI

Vlassis, Ruzow & Linzer hereby submit their brief in opposition to the Petition filed in No. 76-576, for a writ of certiorari to review the judgment of the New Mexico Court of Appeals entered in this case on June 29, 1976.

ARGUMENT

1. The New Mexico Court of Appeals Decided a Matter of State Law Concerning the Application of its Gross Receipts Tax and its Determination is Controlling.

The precise holding of the New Mexico Court of Appeals in Eastern Navajo Industries, Inc. v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (1976), cert. denied, No. 11038 (N.M. Supreme Court, July 27, 1976), was that the state gross receipts tax is not applicable to receipts of a 51% Indian-owned corporation derived from business done on the Navajo Reservation with a Tribal enterprise established by the Navajo Tribal Council to improve housing for Indians on the Reservation. This Court has recently reaffirmed the principle that a state's highest court is the final judicial arbiter of the meaning of state statutes, Gurley v. Rhoden, 421 U.S. 200 (1975); and this Court "repeatedly has held that state courts are the ultimate expositors of state

law (citations omitted) and that we are bound by their constructions except in extreme circumstances." Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). Furthermore, this Court has stated that it will respect the judgment of a state court as to the fair intendment of a state granted tax exemption. Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168 (1947).

A tax is an exaction, and ascertainment of the scope of the exaction -- what is included in it -- is for the state court. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940). On matters of construction of state statutes, this court will defer to the state court interpretation. Illinois Central R.R. v. Minnesota, 309 U.S. 157 (1940); J. Bacon & Sons v. Martin, 305 U.S. 380 (1939). This deference extends to determinations of the incidence of the tax by the state court. This court has held such determinations are controlling. Federal Land Bank of St. Paul v. Bismark Lumber Company, 314 U.S. 95 (1941).

These decisions reflect the long-standing policy of this Court not to review state court determinations concerning the application and effect of state statutes. In the present case, the New Mexico Court of Appeals has made a determination concerning the application of a state gross receipts tax to a state corporation and this Court should deny the petition for certiorari to review the judgment. Such a denial will be in keeping with this

Court's holding in Atlantic Coast Line R.R. v. Phillips, supra, that when dealing with a matter of local policy, like a system of taxation, it should be slow to depart from the construction of local statutes by local courts if there was no real oppression or manifest wrong in the results. Petitioner has failed to demonstrate the "real oppression or manifest wrong" in the present case.

2. The New Mexico Court of Appeals Took Judicial Notice of Certain Federal Regulations, but Based its Decision on Non-Federal Grounds and no Substantial Federal Question has been Presented to this Court.

Petitioner asserts that the New Mexico Court of Appeals has created a conflict between federal law and New Mexico law. The New Mexico Court of Appeals holds that the application of a state tax law is improper under particular circumstances. Nowhere does the Court of Appeals suggest that such federal law invalidates a New Mexico statute. The court in reaching its decision takes judicial notice of a federal statute and certain regulations issued thereunder and takes judicial notice of provisions of the Navajo Tribal Code. Its decision, however, is also firmly grounded in state law.

Petitioner asserts the New Mexico Court of Appeals is using federal law

to "preempt" or "over-ride" state law, but this is not the case.

The Federal statute and regulations which Petitioner asserts were used to preempt state law were never relied on by the Court of Appeals from its decision but were looked to in a discussion by the court which considered provisions of the Navajo Tribal Code. This discussion was directed toward the resolution of the question of whether incorporation of a business by Indians would, under New Mexico law, preclude further consideration of the ethnicity of the stockholders.

In its opinion the New Mexico Court of Appeals never discusses the preemption doctrine nor does it make reference to the outstanding recent tax preemption case with respect to Indian Reservations. Warren Trading Post v. Arizona Tax Comm'n , 380 U.S. 685 (1965).

Instead of relying on federal preemption to overturn the decision of the state tax commissioner, after having resolved the "corporate ethnicity" question, the court relies on Hunt v. O'Cheskey, 85 N.M. 381, 512 P.2d 954 (Ct. App. 1973), a New Mexico case concerning the proper application of the New Mexico gross receipts tax to Indians whose business is carried on upon Reservation land. Thus, the New Mexico Court did not use the preemption doctrine to invalidate a state statute but rather relied on state law to determine whether a particular

assessment of the state tax commissioner was in error.

It is a settled rule that this Court will not review a state court decision resting on an adequate and independent non-Federal ground even though the state court may have also summoned to its support a purportedly erroneous view of Federal law. Where the judgment of the state court rests on two grounds, one involving a Federal question and the other not, and the ground independent of a Federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Hedgebeth v. North Carolina, 334 U.S. 806 (1948).

Petitioner in Part 4 of its brief asks why the regulations cited by the New Mexico Court of Appeals require that the court look beyond the corporate form to the Indian ethnicity of the shareholders. This is not likely to be a profitable inquiry, since the decision of the New Mexico Court to look beyond the corporate form was based on a longstanding New Mexico decision, State T. & A. et al. v. Hermosa L. & C. Co., 30 N.M. 566, 240 P. 469 (1925) which the New Mexico Court of Appeals cited for the position that whenever necessary for the protection of the enforcement of the rights of the membership or shareholders, courts will disregard the legal fiction of a corporate existence separate and distinct from its membership or

shareholders.

This Court has stated that it reviews judgments, not statements in opinions, and that it is the duty of this Court to look beyond the broad sweep of the language in an opinion and determine for itself precisely the ground on which the judgment rests. Black v. Cutter Laboratories, 351 U.S. 292 (1956) (also holding that this Court should not pass on Federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.)

The Court is even less likely to assume jurisdiction in a case, such as this, where the supreme court of the state has denied certiorari to review a lower court decision:

> At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Stembridge v. Georgia, 343 U.S. 541 (1952).

The Stembridge Court held it was without jurisdiction to review the state decision when the question of the existence of an adequate state ground is

debatable.

Petitioner concedes that the federal regulations were not the sole basis for the court's holding. The concluding paragraph of Part 1 of its argument states that the Court of Appeals has made its decision "in part on the strength of federal provisions permitting state corporations to receive funds if fifty-one percent of their shares is owned by Indians" (emphasis added).

Even assuming arguendo that the Court of Appeals has misconstrued the effect of certain federal regulations, the decision is grounded as well on a state court's interpretation and application of state law and, in keeping with the above-cited decisions of this Court, review should be denied.

The New Mexico Court of Appeals has determined the application of the state gross receipts tax and, while taking judicial notice of certain federal regulations in discussing the concept of an Indian corporation, has based its decision on the case law of the state. No substantial federal question has been presented for this Court's review.

Petitioner contends in Part 1 of its argument that this case stands "in marked contrast" to Murray v. State of Washington, 62 Wash.2d 619, 384 P.2d 337 (1963), appeal dismissed, 378 U.S. U.S. 580 (1964), and that this Court should therefore grant certiorari to

review the New Mexico decision.

The question of the propriety of the application of the tax in the Washington case was held by the Washington Supreme Court to be a matter of state law, a position concurred in by this Court which dismissed an appeal for want of a substantial federal question, 384 P.2d at 339.

In Murray, the Supreme Court of the State of Washington upheld the application of a state sales tax to a Delaware corporation formed to construct military housing in Washington state. In this case, the New Mexico Court of Appeals annulled the application of a state gross receipts tax to specific on-reservation activity of a New Mexico Corporation, a majority of whose stockholders were Navajos.

The only "contrast" is that in one case the highest court of a state upheld the application of a state tax, in the other, the highest court annulled the application.

Differing views as to the appropriate interpretation and application of differing state laws by different state courts may well result in opinions which show a "marked contrast," but this does not present a federal question which will serve as the basis for the grant of a Writ of Certiorari.

3. The Decision of the New Mexico Court of Appeals Does Not Conflict with the Decision of the Court of Appeals for the Fifth Circuit, Nor Could Such a Conflict, if One Did Exist, Serve as a Basis for Review by This Court.

Petitioner asserts that United States v. State Tax Comm'n of the State of Mississippi, 505 F.2d 633 (5th Cir. 1974) conflicts with the present case on the effect of incorporation of businesses by Indians under state law. Such an assertion is a misreading of the Mississippi decision, for the Fifth Circuit there limited itself to two questions, both of which it answered in the negative:

1. Was the United States the real party in interest where the taxpayer was a corporation comprised of Choctaw Indians?

2. Did the federal district court have jurisdiction over a taxpayer's dispute with the state tax commission?

Neither of these questions was before the New Mexico court, which concerned itself with determining the correct application of the state gross receipts tax. Since the courts were confronted with dissimilar issues, no conflict could exist with respect to their holdings.

In fact, the Fifth Circuit expressly withheld comment on the issue central to the decision of the New Mexico Court of Appeals: "We intimate no opinion as to the liability of the corporation to pay the tax. It is a matter of state law and, for lack of jurisdiction, is not before us." 505 F.2d at 643 (emphasis supplied).

In the present case the New Mexico Court of Appeals determined the liability of a corporation to pay a state tax and based the decision on New Mexico law. Thus, the New Mexico Court of Appeals spoke to the very issue concerning which the Fifth Circuit intimated no opinion for lack of federal court jurisdiction.

To establish a "conflict" Petitioner cites dicta from the Fifth Circuit decision concerning the matter of corporate status under the laws of Mississippi. The Petitioner would have this Court assert jurisdiction over a New Mexico court interpreting New Mexico corporate and tax law because dicta in a Fifth Circuit decision indicates that the corporate law of the state of Mississippi may differ from the corporate law of the state of New Mexico! Petitioner has failed to indicate how this "conflict" brings the present case within the jurisdiction of this Court under Title 28 U.S.C. § 1257(3).

4. The Decision of the New Mexico Court of Appeals is Not in Conflict with Prior Decisions of This Court.

Petitioner in Part 3 of his argument asserts that Respondent is not, in law or fact, an Indian. Nevertheless, the New Mexico Court of Appeals held that for purposes of the state gross receipts tax a 51% Indian-owned corporation doing business on a reservation with a Tribal enterprise will be treated as an Indian entity and its decision must prevail.. This Court has held in the cases reviewed in Part 1 of this brief that the construction of a state statute by a state court in circumstances such as those present here is controlling. Since the New Mexico Court of Appeals has characterized Respondent as "an Indian entity," the decisions of this Court relating to state tax jurisdiction over non-Indians and cited by Petitioner have little bearing on the present case.

Petitioner also contends in Part 3 of his argument that Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), precludes a finding by the New Mexico Court of Appeals that a state tax on an Indian corporation is an impermissible burden on Indian self-government. In Mescalero, this Court upheld a state tax on a Tribal enterprise operating off the reservation and placed great emphasis on the fact that the business activity taxed by the state was so situated. This opinion is not

controlling in the present case for the taxable activity occurred on the Navajo Reservation and thus comes within the McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) holding which prohibited state taxation of Indians on Indian land absent Congressional authorization. The McClanahan Court observed that Tribes, immune from state taxation, are composed of individuals who are also immune. 411 U.S. at 181.

The New Mexico Court of Appeals has held that under state law a New Mexico corporation is also composed of individuals. The court further held that the Indian ethnicity of these individuals will prevent the application of the state gross receipts tax to corporate activity if 51% of the shareholders are Indians, if the corporate activity takes place on the reservation, and if the corporate services were rendered to a tribal enterprise in furtherance of the tribal goal of providing adequate housing on the reservation for Indians. This is a very narrow holding concerning a matter of state law and is not in conflict with the decisions of this Court.

Petitioner states that this Court sanctioned an affirmative burden on reservation Indians to collect and pay over a sales tax imposed on non-Indian purchasers in Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976). Petitioner asserts that in

the present case the gross receipts tax is levied only against a corporation, and that no Indian has any affirmative burden placed upon him. In Moe this Court stated that "this burden is not, strickly speaking, a tax at all," 425 U.S. at 463, since the required collection of a tax from customers was more in the nature of an administrative task than a financial burden. In the present case, the corporation was not asked to collect a tax; it was required to pay one. The burden placed on it by the state was direct and substantial. Nor is the tax "only" on the corporation, for the state court held that under New Mexico law a corporation is made up of its shareholders and that a tax levied on the corporation would, when necessary to protect the rights of the shareholders, be construed as a tax levied on the individual shareholders.

5. The New Mexico Court of Appeals Did Not Erroneously Rely Upon Federal Legislation Enacted After the Assessment Periods in Question.

The New Mexico Court of Appeals, in its discussion of Indian ethnicity as it relates to taxation of state corporations refers to an Indian Business Development Fund Act and paraphrases the language of 25 C.F.R. § 80.12 (1971) which is quoted in full earlier in the opinion. Petitioner points out in Part 4 of his argument that an Indian Business Development Fund Act does not exist under that name and that the Court

of Appeals may have intended to refer to the Indian Financing Act of 1974, Pub.L. 93-262, 88 Stat. 77, 25 U.S.C. §§ 1451 through 1543. The Indian Financing Act was enacted after the tax assessment and it, therefore, appears unlikely that the Court would have found the provisions of that Act persuasive. The intention of the Court of Appeals is made clear by reference to those regulations which it cites, 25 C.F.R. Part 80 (1971), which establish regulations to administer a new grant program under the authority of 25 U.S.C. § 13 (1970) and is entitled "Indian Business Development Fund." Presumably, the Court of Appeals reference to the Indian Business Development Fund Act was to these Federal regulations and not to the Indian Financing Act as Petitioner implies. Thus, Petitioner's supposition that state law was preempted by Federal law which did not exist at the time of the tax assessment is without merit and should not serve as a basis for review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE P. VLASSIS
LAWRENCE A. RUZOW
1545 West Thomas Road
Phoenix, Arizona 85015
Attorneys for
VLASSIS, RUZOW & LINZER

Of Counsel:
KATHERINE OTT

March 25, 1977